IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1996

No. 96-843

NATIONAL CREDIT UNION ADMINISTRATION,
PETITIONER

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Since its passage in 1934, the Federal Credit Union Act (FCUA) has limited membership in a federal credit union to "groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." 12 U.S.C. 1759. In the petition for a writ of certiorari (at 20-27), we explain that the National Credit Union Administration's (NCUA) longstanding interpretation of the common bond provision is consistent with the language of the statute and entitled to deference under *Chevron U.S.A.* Inc. v. Natural *Resources Defense Council, Inc*., 467 U.S. 837 (1984). We further demonstrate (Pet. 16-20) that the court of appeals' ruling permitting banks to challenge the

NCUA's implementation of rules established by Congress for federal credit union membership improperly expands the concept of "zone of interest" standing beyond this Court's precedents and conflicts with the decision of the Fourth Circuit in Branch *Bank & Trust Co. v. NCUA,* 786 F.2d 621 (1986), cert. denied, 479 U.S. 1063 (1987). Finally, we describe (Pet. 15, 27) the grave national consequences of the court's decision to overturn the NCUA's interpretation of the common bond requirement, which threatens the survival of nearly 3600 federal credit unions nationwide with more than 32 million members, assets of $150 billion, loans of $94 billion, and $132 billion in member shares. For these reasons, the D.C. Circuit's decision plainly warrants review by this Court.

Respondents do not contest our representation that the decision has an immediate and substantial impact on thousands of multiple group federal credit unions nationnvide. Instead, they suggest (Br. in Opp. 18) that this case is not significant because credit union services are available through state chartered credit unions. That position, however, is at odds with respondents' assertion that they have standing to enforce the Federal Credit Union Act, a statute designed by Congress to establish a nationwide *"Federal* Credit Union" system, 12 U.S.C. 1751 (emphasis added). See Pet. 3-4. Moreover, respondents concede that the decision conflicts with the holding of the Fourth Circuit in *Branch* Bank that banks lack standing to challenge the NCUA's interpretation of the common bond provision (Br. in Opp. 13), and that, unless the Sixth Circuit were to disagree with the D.C. Circuit decision regarding the merits of the NCUA's interpretation, there is almost

no possibility of a circuit conflict developing on this issue in the future (Br. in Opp. 18-19).

2. a. Respondents nevertheless oppose plenary review by this Court.[1] They first contend (Br. in Opp.

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1. In a footnote to their Statement, respondents make two assertions that are either inaccurate or misleading. First, they state (Br. in Opp. 10 n.10) that the mandate of the court of appeals was expedited "in light of statements made by the NCUA that it would not follow the decision." We presume respondents are referring to statements made by the NCUA in a press release and a letter to credit unions issued shortly after the court of appeals' decision. Both the press release and the letter advised that the agency continued to believe that its common bond policv remained legally sound and operationally critical and would remain in effect pending Justice Department deliberations as to whether to seek further review of the court's decision. Nevertheless, both the press release and the letter explicitly admonished credit unions that the NCUA's multiple group policy was in conflict with the D.C. Circuit's decision, and cautioned that any application approved after the date of the court of appeals decision was subject to invalidation, which could mean that credit unions would have to divest any group or member added after the decision that was found to be in violation of the ruling. See App., infra, la-3a, 4a-7a. In any event, at the time these statements were issued, there was no injunction in place, and. @'[plending review in the Court of Appeals and in this Court, the Government [was] free to continue to apply the statute." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 155 (1963).

Next, respondents assert (Br. in Opp. 10 n.10) that the petition incorrectly states (at 13) that a motion is pending in the district court concerning retroactive divestiture of credit union groups or members who do not share a common bond with the core group. However, both the complaint filed by the American Bankers Association (Amended Complaint for Declaratory and Injunctive Relief at 9) and their Memorandum In Support Of Their notion For A Temporary Restraining Order Or, In The Alternative, A Preliminary Injunction (at 6) state that the plaintiffs seek nationwide divestiture of member

10-13) that *Branch Bank* no longer presents a "live" conflict because this Court in *Clarke v. Securities Indus. Ass'n,* 479 U.S., 388 (1987), "specifically overruled" Branch Bank. There is no basis for that assertion. As we explain in our petition (at 18 n.9), the petition for certiorari in Branch Bank on the standing issue was pending before this Court while *Clarke* was under submission. The Court held the petition pending disposition of *Clarke. After Clarke* was decided, the Court did not grant certiorari, vacate, and remand Branch Bank in light of *Clarke,* as would be expected if the Court intended for the Fourth Circuit to reconsider its decision. Instead, this Court simply denied certiorari. 479 U.S. 1063 (1987). That treatment negates respondents' view that the decision in Clarke "overruled" Branch Bank. Nor is there any reason to doubt that *Branch* Bank still represents the law in the Fourth Circuit, notwithstanding the fact that subsequent challenges to the NCUA's policy from parties resident in that circuit, such as the North Carolina banks that are the respondents here, have sought to avoid the Fourth Circuit's rule by filing their challenges in the D.C. Circuit.

Similarly, respondents are incorrect (Br. in Opp. 13) to assert that footnote 15 of the Clarke opinion

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groups whom the NCUA has authorized to join credit unions in the past. The district court plainly considered this request still pending as of its October 25, 1996, order, when it stated: "The prayer for final judgment in the ABA case is, thus, as general as the holding in *[First National Bank & Trust]:* a prospective injunction, and a retrospective divestiture of all disparate employee groups acquired bv federal credit unions throughout the country pursuant to NCUA's misconceived policy." Pet. App. 58a-59a.

(479 U.S. at 400 n.15) supports their view that Branch *Bank* was "specifically overruled" by *Clarke.* That footnote in *Clarke* does not even cite *Branch Bank,* much less "overrule[]" it. To be sure, that footrote expresses disapproval with other D.C. Circuit cases that had applied the "zone of interest" test, such as *Control Data Corp. v. Baldrige,* 655 F.2d 283, 293-294 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981). And though respondents correctly note (Br. in Opp. 13 n.12) that *Branch Bank* cites *Control Data,* the citation is for the unobjectionable statement that a court must " examin[e] * * * the language of the relevant statutory provisions and their legislative historv" to determine whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency action. Branch Bank, 786 F.2d at 625 (quoting Control Data, 655 F.2d at 294). Cf. *Clarke,* 479 U.S. at 399. But nothing in the *Clarke* opinion or in the Court's treatment of *Branch Bank* in the aftermath of *Clarke* casts doubt on Branch *Bank* as valid precedent in the Fourth Circuit.

b. With regard to the merits of the court of appeals' standing determination, respondents contend (Br. in Opp. 13-14) that the court's conclusion that competitors are "suitable challenger[s]" was merely a straightforward application of this Court's decisions in *Clarke and Investment Co. Institute* v. Camp, 401 U.S. 617 (1971). Accordingly, they argue (Br. in Opp. 14 n.13). there was no occasion for the court of appeals to discuss this Court's subsequent "zone of interest" decision in Air *Courier Conference* v. American *Postal Workers* Union, 498 U.S. 517 (1991), which, thev contend, was not a competitor standing case.

That contention, however, misunderstands the point we make in the petition (at 18-19): in adopting a

"suitable challenger" test, the D.C. Circuit has assumed erroneously that Clarke changed the longstanding principles upon which "zone of interest" standing should be analyzed in competitor cases, whereas Air Courier made clear that *Clarke* intended the rules for determining standing to be the same in all cases where a plaintiff challenges an agencv decision. See, *e.g., Air Courier,* 498 U.S. at 523, 529-530 (denying standing to party seeking to challenge agency action). As a consequence, the court of appeals' failure even to mention *Air Courier* when it concluded that banks were within the zone of interests of the FCUA's common bond provision is illustrative of the extent to which the D.C. Circuit's standing test departs from decisions of this Court and warrants plenary review.

3.a. Respondents further contend (Br. in Opp. 14-17) that certiorari is not necessary because the court of appeals properly denied Chevron deference to the NCUA's interpretation of the common bond provision in light of the purportedly unambiguous statutory mandate. Specifically, thev assert (Br. in Opp. 15) that "[o]nly two readings of this provision have been suggested"--the reading proposed by the NCUA and the one adopted by the court of appeals--and that only the court of appeals' reading comports with the statutory language. Respondents neglect to point out, however, that the court of appeals rejected as "[un]convincing" respondents' own (third) interpretation that the statutory requirement of "a common bond" in federal credit unions provided conclusive evidence of Congress's intent to limit the membership of a single credit union to one common bond. Pet. App. 6a. As the court stated, "[t]he article 'a' could just as easily mean one bond for each group as one bond for

all groups in [a federal credit union]." Ibid. The fact that the court and the litigants had three separate views of the common bond provision supports the NCUA's contention that the statutory provision is, at best, ambiguous and thus entitled to Chevron deference.

Respondents also incorrectly state (Br. in Opp. 2, 6, 15) that the NCUA's adoption of its current common bond policy in 1982 represented a "dramatic" change in the agency's interpretation of the common bond provision and that under the NCUA's interpretation of Section 1759, any single federal credit union could itserve every person in the United . States who is employed." As we explain in our petition (at 5-6 & n.3), the NCUA has fulfilled Congress's intent to provide "flexible" regulation by modifying from time to time over the past three decades the regulatory requirements under the common bond standard to accommodate changing economic circums*tances in the credit union industry*. Those changes also permitted family members and credit union employees to join, and allowed a person to retain membership in the credit union for life. See Pet. 6 n.3. Contrary to respondents' suggestion, petitioner's regulatory changes have been both consistent with the statutory text and reasonable in light of Congress's purposes in enacting the FCUA, and thus are entitled to deference even if those changes depart from earlier regulatory decisions. See*, e.g.,* Smiley v. Citibank *(South Dakota) N.A.,* 116 S. Ct. 1730, 1734 (1996).

b. Finally, respondents argue (Br. in Opp. 17-19) that, at least until an actual circuit conflict arises with respect to the question presented on the merits, certiorari should be denied since the question "is unique to the Federal Credit Union Act" and so,

presumably, limited in its impact. Of course, as respondents themselves concede (Br. in Opp. 18), the possibility of a circuit conflict is confined to a single case pending in the Sixth Circuit; and even in that instance, the NCUA would be unable to seek this Court's review if the Sixth Circuit ruled in its favor. Given the decision below, the banking industry would likely have no incentive to seek certiorari of an adverse decision in the Sixth Circuit, since it could presumably file any subsequent challenge to the NCUA's application of its regulations in the District of Columbia (and thus avoid an adverse ruling elsewhere). In addition, if a conflict does not develop in the Sixth Circuit case, the breadth of the district court's nationwide injunction means, in the words of respondents (Br. in Opp. 19), that "the issue will cease to arise."

Meanwhile, unless the Court grants certiorari, thousands of federal credit unions that have relied on the NCUA's construction of the common bond provision will suffer serious and immediate commercial harm [2]. Thus, the mere fact that the statutory question presented bv our petition involves only the federal credit union industry is not a basis for denying review. This Court has granted certiorari to review questions of great importance to a particular community or industry even in the absence of a direct

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2. In recognition of this immediate harm, the D.C. Circuit granted a stay of so much of the district court orders that bar a credit union from enrolling new members of existing occupational groups that do not share a common bond with the credit union's core membership. Br. in Opp. App. 5a. But the court of appeals directed the parties to "file motions to govern further proceedings herein within fourteen days of the Supreme Court's resolution of the petitions for *certiorari." Ibid.*

circuit conflict, particularly where the decision overturns a long-established interpretation of a statute by the administrative agency,charged with its enforcement. See, *e.g., Board of Governors of the Federal Reserve System v. MCorp* Financial, Inc., 502 U.S. 32, 34 (1991) (granting certiorari where the issue was of substantial importance in the administration of bank regulatory law); *Securities Indus. Ass'n v. Board of Governors of the Federal Reserve System,* 468 U.S. 137,142 (1984) (same).[3] Similarly, this Court has not hesitated to review decisions from courts with nationwide jurisdiction, such as the D.C. Circuit and the Federal Circuit, in the absence of a circuit conflict when the issue is of substantial importance. See, *e.g., United States v. Hill,* 506 U.S. 546, 549 (1993).

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For the reasons stated above and in the petition for a wvrit of certiorari, the petition should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JANUARY 1997

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3. Whether the decisions of other courts of appeals that recently have invalidated important regulations of other federal agencies (see Br. in Opp. 17 & nn.16-18) warrant certiorari says nothing about the worthiness of this case for plenary review. As we have shown, the extraordinary importance of this case to the credit union industry and to the general public weigh heavily in favor of review at this time.